FILED
FEB 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1007 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1983

TIFFANY FINE ARTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
GLENN L. ARCHER, JR.
Assistant Attorney General
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an IRS summons, issued to a named taxpayer in connection with an investigation of that person's tax liability, must meet the special requirements applicable to a "John Doe summons," where the information sought might incidentally facilitate the investigation of other, unnamed taxpayers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Barter Systems, Inc.*, 694 F.2d 163	4, 7, 8
United States v. *First National Bank*, 635 F.2d 391, cert. denied, 452 U.S. 916	6
United States v. *Flagg*, 634 F.2d 1087, cert. denied, 451 U.S. 909	6
United States v. *Gottlieb*, 712 F.2d 1363	4, 7, 8
United States v. *LaSalle National Bank*, 437 U.S. 298	6
United States v. *Powell*, 379 U.S. 48	5
United States v. *Thompson*, 701 F.2d 1175	4, 7, 8

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
§ 6045	8
§ 7402(b)	3
§ 7602	6
§ 7602(a)(1)	2, 5
§ 7604	3
§ 7609(f)	*passim*
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 *et seq.*:	
§ 311(a)(1), 96 Stat. 600	8-9
§ 333(a), 96 Stat. 622	6

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1007

TIFFANY FINE ARTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 718 F.2d 7. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on September 13, 1983. A petition for rehearing was denied on October 28, 1983 (Pet. App. A13). The petition for a writ of certiorari was filed on December 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are related corporations that promote tax-sheltered investments (Pet. App. A2). The IRS in 1981 began an investigation to determine petitioners' correct tax liability for 1979-1980. In aid of that investigation, the Service issued summonses to petitioners under Section 7602(a)(1) of the Code.[1] The summonses requested production of petitioners' financial records and books of account, as well as a list of names, addresses, and taxpayer identification numbers of persons who had acquired "Pedi-Pulsor" distributorships from petitioners. Pet. App. A2-A3.[2] A "Pedi-Pulsor" is a medical device (Pet. 4).

Petitioners refused to comply with the summonses, contending that the IRS could obtain information about their customers and franchisees only in accordance with Section 7609(f) of the Code. That Section sets forth special requirements for issuance of a "John Doe summons," *i.e.*, a summons "which does not identify the person with respect to whose liability

---

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] One of the summonses also requested production of a list of clients "who acquired lithographs from Tiffany Fine Arts, Inc." (Pet. App. A2). Tiffany Fine Arts does not in fact sell lithographs (Pet. 5, 6). The IRS agent testified that he had received information that a company called "Tiffany" was selling lithographs in Florida (Pet. App. A4). Upon inquiry, petitioners' attorney refused to confirm or deny that Tiffany Fine Arts sold lithographs (*ibid.*). The agent accordingly included in the summons a request for lithograph information "out of an abundance of caution" (*id.* at A4-A5).

the summons is issued."[3] Upon petitioners' refusal to comply, the government brought this action to enforce the summonses in the United States District Court for the Southern District of New York. Pet. App. A3; I.R.C. §§ 7402(b), 7604.

In support of its enforcement petition, the government introduced affidavits of the IRS agent who was handling the audit of petitioners. The agent stated that he was "conducting an investigation, one purpose of which [was] to ascertain the correctness of [petitioners'] corporate income tax returns" (Pet. App. A3). The agent was concerned about questionable business deductions and "possible underreporting of income" by petitioners, an underreporting he suspected might be traceable to an omission from income of "certain recourse and non-recourse notes provided by [Pedi-Pulsor] licensees" (*id.* at A4). To verify the correctness of petitioners' returns, the agent explained, it was necessary to identify petitioners' customers, examine the licensing agreements the customers signed, and compare the amounts shown in those agreements with the amounts petitioners reported; petitioners' offer to furnish redacted records was thus unacceptable (*ibid.*). The agent conceded

---

[3] Under Section 7609(f), the IRS may serve a "John Doe summons" only if the Commissioner establishes that:

> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
>
> (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
>
> (3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

that the summonsed information, besides facilitating his investigation of petitioners, could also facilitate investigation of petitioners' clients. He acknowledged the possibility that the IRS, after receiving the information, might make "further inquiry * * * into whether [the clients] ha[d] correctly reported their income" (*id.* at A5).

The district court ordered the summonses enforced, finding that an evidentiary hearing to determine the IRS's "real motivation" was unnecessary in light of the revenue agent's uncontradicted affidavit (Pet. App. A5). The court of appeals unanimously affirmed (*id.* at A1-A12). It held that the "John Doe" rules of Section 7609(f) have no application where (as here) the IRS issues a summons to a named taxpayer in aid of a bona fide investigation of that person's tax liability. The court deemed irrelevant the possibility that records thus summonsed might prove useful in auditing other, unnamed taxpayers, citing the absence of any indication that Congress intended Section 7609(f) to apply in such situations (Pet. App. A10), and noting this Court's consistent holdings that the IRS summons power "should be construed broadly" (*ibid.*, citing cases). In so ruling, the court below followed the reasoning of the Eighth and Eleventh Circuits in *United States* v. *Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982), and *United States* v. *Gottlieb*, 712 F.2d 1363 (11th Cir. 1983), and rejected as unpersuasive the contrary reasoning of the Sixth Circuit in *United States* v. *Thompson*, 701 F.2d 1175 (1983). Finally, the court of appeals held that the trial judge had not abused his discretion in declining to hold an evidentiary hearing, noting that the revenue agent's affidavits "established an ongoing IRS investigation of [petitioners] sufficient to support the summonses * * * without compliance with the John Doe provisions" (Pet. App. A12).

ARGUMENT

The decision below is correct. Contrary to petitioners' contention, there is no conflict among the circuits on the question presented. There is no basis for review by this Court.

1. The court of appeals correctly held that the "John Doe" provisions have no application to the summonses involved here. Section 7609(f) by its terms applies only if a summons "does not identify the person with respect to whose liability [it] is issued." The legislative history, moreover, shows that Congress intended the Section to apply only where "the IRS [has] issued a summons to an identifiable party *in whom it* [*has*] *no interest* in order to investigate the potential tax liabilities of unnamed third parties" (Pet. App. A10, emphasis added). In this case, the IRS was plainly interested in (indeed, was actively investigating) petitioners, and petitioners were clearly identified as the "person[s] with respect to whose liabilit[ies]" the summonses were issued. Since the summonses sought information "which [might] be relevant" in determining petitioners' tax liabilities (I.R.C. § 7602(a)(1)), and since the summonses were issued "in good faith" under the standards set forth in *United States* v. *Powell*, 379 U.S. 48, 53-54 (1964), enforcement was entirely proper.

Even if one assumes that the IRS in issuing the summonses was motivated by the "dual purpose" (Pet. 11) of investigating *both* petitioners *and* their clients, that assumption would not bring Section

7609(f) into play. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court sustained the validity of a "dual purpose" summons, ruling that a summons issued under Section 7602 is enforceable so long as the IRS in an institutional sense has not abandoned its purpose of civil tax determination, notwithstanding that the issuing agent's purpose is to investigate criminal conduct. 437 U.S. at 318.[4] By a parity of reasoning, the existence of a secondary purpose to obtain data useful in auditing petitioners' clients would not serve to trigger the operation of Section 7609(f) here. Cf. *United States* v. *Flagg*, 634 F.2d 1087, 1091-1092 (8th Cir. 1980), cert. denied, 451 U.S. 909 (1981) (enforcing summons issued to named taxpayer where IRS had secondary purpose of developing data for Taxpayer Compliance Measurement Program); *United States* v. *First National Bank*, 635 F.2d 391, 395-396 (5th Cir.), cert. denied, 452 U.S. 916 (1981) (same).

The decision below is supported both by common sense and by sound tax policy. As the court of appeals noted (Pet. App. A11), virtually every IRS summons is likely to yield information about parties with whom the taxpayer has dealt, and thus in some degree to facilitate the identification and investigation of unnamed taxpayers. On petitioners' theory, anyone who receives a summons under Section 7602 could demand that the IRS satisfy the more rigorous requirements of Section 7609(f), subjecting the

[4] After *LaSalle* was decided, Congress amended Section 7602 to permit the issuance of a summons to investigate both civil and criminal tax matters, so long as no "Justice Department referral is in effect." Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 622. The amendment became effective September 3, 1982.

Service to far greater administrative and enforcement burdens than Congress can possibly have intended. As noted above, Congress did not intend the John Doe rules to apply to summonses (like those here) issued to a named taxpayer who is himself under IRS investigation.

2. Contrary to petitioners' contention (Pet. 9-11), the decision below does not present the circuit conflict represented by *United States* v. *Barter Systems, Inc.*, 694 F.2d 163 (8th Cir. 1982), *United States* v. *Gottlieb*, 712 F.2d 1363 (11th Cir. 1983), and *United States* v. *Thompson*, 701 F.2d 1175 (6th Cir. 1983). Each of those cases involved a summons issued to a barter exchange whose tax liability was being investigated. The Eighth and Eleventh Circuits sustained the summonses' validity, holding that the existence on the IRS's part of a secondary purpose to investigate the exchanges' customers did not trigger the John Doe rules. 694 F.2d at 168-169; 712 F.2d at 1368-1369. The Sixth Circuit in *Thompson* reached the opposite conclusion. It noted that the IRS had instituted a nationwide "Barter Exchange Project" and had stated publicly that its objective was to identify barter exchange members as audit targets. 701 F.2d at 1176. Inferring from this that the IRS had adopted an "institutional posture" of identifying "an ascertainable group of persons whose potential liability [was] at issue" (*id.* at 1178, 1179), the Sixth Circuit concluded that the exchange's members, as well as the exchange itself, were "person[s] with respect to whose liability the summons [was] issued" within the meaning of Section 7609(f). The court explicitly limited its decision to cases "where it is shown that there exists a clear intent to investigate unknown third parties at the time the summons is issued"; distinguished the barter-exchange

situation "from other situations where there may not be such an established institutional purpose"; and held that its reasoning would not necessarily apply where there exists but "a remote possibility that in the course of the investigation * * * information might be discovered leading to investigations of then unidentified taxpayers." *Id.* at 1180.

The decision below does not conflict with *Thompson*. The IRS in this case, in contrast to the barter-exchange cases, had no "established institutional purpose" to investigate the summonsed taxpayer's clients. Rather, the district court found that "[the IRS's] interest [was] in an audit of the consolidated returns of [petitioners]," and the court discerned no more than a "possib[ility]" that the clients' returns might be examined (Pet. App. A5). The decisions below do not contain the finding, essential to the Sixth Circuit's holding in *Thompson* (701 F.2d at 1180), that at the time the summonses were issued "there exist[ed] a clear intent [on the IRS's part] to investigate unknown third parties." [5]

Even in the barter-exchange context, the conflict between *Thompson* on the one hand, and *Gottlieb* and *Barter Systems* on the other, may not require resolution by this Court. In 1981, Congress amended Section 6045 of the Code to require barter exchanges to provide the IRS with the names and addresses of all participants in barter transactions. Tax Equity

[5] Nor, contrary to petitioners' suggestion (Pet. 6, 10), could the inclusion in the summons, "out of an abundance of caution" (Pet. App. A4-A5), of a request for information about lithograph purchasers have furnished any basis for such a finding—a fact immaterial in any event in light of petitioners' assertion (Pet. 5, 6) that they have never sold lithographs. See page 2 note 2, *supra*.

and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 311(a)(1), 96 Stat. 600. Moreover, an appeal is now pending to the Sixth Circuit in *United States* v. *Barter Systems of Grand Rapids*, No. 82-1961, which involves the same issue as *Thompson*, and which will provide the Sixth Circuit an opportunity for en banc reconsideration of that decision.

3. Finally, petitioners contend (Pet. ii, 12-13) that the district court should have ordered an evidentiary hearing to determine whether the IRS was legitimately concerned with their tax liabilities or was merely using that investigation as a pretext "to circumvent the procedures of Section 7609(f)." As the court below held (Pet. App. A12), however, the decision whether to order an evidentiary hearing is committed to the trial judge's discretion. In view of the revenue agent's affidavits establishing a bona fide, on-going IRS investigation of petitioners, the district judge plainly did not abuse his discretion in declining to hold a hearing here. In any event, this basically factual question does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

FEBRUARY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 4339470 269